

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: FEB 26 2013

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner seeks to employ the beneficiary as an alien of exceptional ability as a professional hockey player, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The director determined "that the petitioner has not established eligibility for the benefit sought."

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the AAO is satisfied that the evidence of record adequately establishes the beneficiary's eligibility for the classification.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The Service has held that an alien with exceptional ability as an athlete could, if otherwise qualified, qualify as a person of exceptional ability in the arts. *Matter of Masters*, 13 I&N Dec. 125 (D.D. 1969).

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, arts, or business:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

(C) A license to practice the profession or certification for a particular profession or occupation

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

(E) Evidence of membership in professional associations

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

Additionally, 8 C.F.R. § 204.5(k)(3)(iii) states that "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

If a petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the antecedent regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); *see also Kazarian*, 596 F.3d at 1119-20. Only aliens whose achievements demonstrate "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); *see also Kazarian*, 596 F.3d at 1119-22.

While *Kazarian* involved a different classification than the one at issue in this proceeding, the similarity of the two classifications makes the court's reasoning in *Kazarian* persuasive to the classification sought in this matter. Specifically, the regulations state a regulatory standard and provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian*, 596 F.3d at 1221, *citing Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed.

II. ANALYSIS

A. Evidentiary Criteria

The petitioner seeks to classify the beneficiary as an alien of exceptional ability. Upon review of the entire record, the AAO affirms the director's finding that the petitioner has established that the beneficiary meets the minimum eligibility requirements necessary to qualify as an alien of exceptional ability. 8 C.F.R. § 204.5(k)(3).

B. The Offered Position

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

Upon review of the Form ETA 750, the AAO finds that, based upon such factors as the listed salary of \$500,000, the job offer portion, in the aggregate, demonstrates that the job does require an alien of exceptional ability.

C. Final Merits Determination

The AAO will next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated that the beneficiary has "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2).

In the present matter, the petitioner has submitted sufficient documentation, including evidence of a \$500,000 annual salary, to establish that the beneficiary, a professional hockey player, is an alien of exceptional ability.

III. CONCLUSION

While the AAO does not find that all of the petitioner's evidence carries the weight imputed to it by counsel, the AAO does find the evidence of record sufficient to establish that the petitioner has demonstrated the beneficiary's eligibility for the classification sought. Specifically, upon careful review of the record, it is concluded that the petitioner has demonstrated by a preponderance of the evidence that the beneficiary has a degree of expertise significantly above that ordinarily encountered, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and that his services are sought by an employer in the United States.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has sustained that burden.

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ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.